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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-679

CHARLES WOLFF, JR., ET AL., PETITIONERS

v.

ROBERT O. MCDONNELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether all of the due process requirements applicable to parole and probation revocation proceedings, as enunciated by this Court in *Morrissey* v. *Brewer* and *Gagnon* v. *Scarpelli*, are required in prison disciplinary proceedings.

2. Whether any newly-announced standards should be given retroactive application so as to invalidate prior prison disciplinary proceedings.

3. Whether the court below properly held that prison officials are barred from opening incoming mail from attorneys to inspect for contraband.

INTEREST OF THE UNITED STATES

This case presents questions as to whether particular procedures and practices concerning the custody and discipline of prison inmates are required as a matter of due process of law. Although the case involves directly only the practices in prisons in a single state, the Court's decision on the constitutional issues raised is likely to have a direct impact on the existing practices and procedures for management and control of inmates in all other prisons as well, including federal prisons.

The federal prison population represents one-ninth of the Nation's confined offenders; presently it stands at slightly over 23,000 inmates, incarcerated in 49 institutions of various types through the country.[1] During fiscal 1973, the Federal Bureau of Prisons conducted approximately 19,000 misconduct hearings

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[1] The Bureau of Prisons presently operates six maximum security institutions, six intermediate term adult institutions, thirteen short term adult institutions, seven young adult institutions, three juvenile facilities, four institutions for female offenders, nine community treatment centers and one intensive medical treatment facility.

at these institutions. Like many states, the Bureau has established formal procedures for these hearings, and efforts to improve these procedures are ongoing. Resolution of the issues raised in this case may have a substantial impact on the management and control of federal prisoners, and a ruling requiring all prison disciplinary procedures to fit into any particular format or mold may inhibit the continuing development and revision of disciplinary procedures by the Bureau.

STATEMENT

On July 1, 1970, respondent, on behalf of himself and other inmates of the Nebraska Penal and Correctional Complex, Lincoln, Nebraska, brought a civil rights action under 42 U.S.C. 1983 in the United States District Court for the District of Nebraska. He alleged that disciplinary proceedings in the complex were conducted in violation of procedural and substantive due process; that the inmate legal assistance program did not meet constitutional standards; and that the regulations governing petitioners' mail were unconstitutionally restrictive.

After an evidentiary hearing, the district court granted partial relief, finding, *inter alia*, (1) that the prison's policy of opening and reading all incoming and outgoing mail was improper; (2) that prison authorities were not required to provide inmates with any fixed procedural guarantees at disciplinary hearings as a matter of procedural due process; and (3) that in certain instances good time that had been

taken away from inmates had to be restored because the withholding was not authorized by state law and hence resulted in a denial of substantive due process (Pet. App. 15; 342 F. Supp. 616).

The court of appeals reversed in part and remanded, holding that the procedural due process requirements articulated by this Court in the context of parole and probation revocation proceedings (*Morrissey* v. *Brewer*, 408 U.S. 471, and *Gagnon* v. *Scarpelli*, 411 U.S. 778)[2] "should be generally followed" with respect to prison disciplinary hearings which may result in the imposition of substantial penalties (Pet. App. 4; 483 F. 2d 1059, 1063). It also directed the district court to determine what requirements were necessary for disciplinary proceedings resulting in serious penalties—other than loss of good time[3]—

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[2] Those procedures are: written notice of the claimed violation; disclosure to the alleged violator of the evidence against him; opportunity to be heard in person and to present witnesses and documentary evidence; the right to confront and cross examine witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); a neutral and detached hearing body; a written statement by the fact finder as to the evidence relied on and the reasons for revocation; and counsel, on request, where the violator makes a colorable denial of the alleged violation or asserts justification or other mitigating circumstances and the reasons are complex or otherwise difficult to develop. See *Gagnon* v. *Scarpelli*, *supra*, 411 U.S. at 786, 790-791.

[3] The court of appeals held that claims relating to loss of good time, affecting as they do the duration of confinement rather than the conditions of confinement, were not cognizable in this civil rights action, under this Court's decision in *Preiser* v. *Rodriguez*, 411 U.S. 475. Accordingly, it held that

to meet those standards, including the circumstances in which assistance of counsel might be required (Pet. App. 6; 483 F. 2d at 1064). The court of appeals further concluded that in those instances where past disciplinary hearings had not been held in compliance with these new requirements, determinations of misconduct must be expunged from the record (Pet. App. 7; 483 F. 2d at 1064). Finally, the court affirmed that portion of the district court's order striking down the prison regulation which called for the opening and reading of mail to and from attorneys (Pet. App. 13; 483 F. 2d at 1066-1067).

SUMMARY OF ARGUMENT

1. The petition presents the question whether the court of appeals properly held that all the procedural requirements for revocation of parole and probation established by this Court's decisions in *Morrissey* v. *Brewer*, 408 U.S. 471, and *Gagnon* v. *Scarpelli*, 411 U.S. 778, must also be satisfied in prison disciplinary proceedings resulting in segregation or other serious penalties (other than loss of good time credits). We contend that the court of appeals erred in mechanically extending to the unique setting of prison discipline the *Morrissey-Scarpelli* requirements.

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it would be improper for the district court on remand to restore good time that may have been taken from inmates in proceedings that did not meet the requirements of procedural or substantive due process (Pet. App. 6; 483 F. 2d at 1063-1064).

The court of appeals' automatic importation of all of the *Morrissey-Scarpelli* requirements ignores the differences in the circumstances, the governmental interests, and the private interests at stake in the different contexts of prison discipline and revocation of parole or probation—considerations which *Morrissey* holds ought to be taken into account.

Assuming that some process is due in prison disciplinary proceedings, we contend that such process need not be the same as that held due in *Morrissey* and *Scarpelli*, and that the current procedures of the Bureau of Prisons satisfy, if they do not exceed, any constitutionally required minimal procedures in this area. These procedures include written notice of the alleged misconduct; an opportunity to be heard in person; disclosure of evidence, subject to limitations; opportunity to present documentary evidence; hearing by officers not involved in reporting or investigating the misconduct; and written report by the fact-finders stating their conclusions and the evidence relied upon. The Bureau of Prisons believes that omission of certain of the *Morrissey-Scarpelli* requirements that are not reflected fully or unqualifiedly in the current Bureau of Prisons' procedures—the presumptive right to confront and cross-examine adverse witnesses, the related right to full disclosure of all the evidence of misconduct, the unqualified right to call witnesses, and the right to counsel—is justified by substantial reasons reflecting the purposes of prison discipline and the unique setting in which it occurs.

In the first place, the private interest affected by prison discipline is *a fortiori* more limited than the interest affected by revocation of parole or probation. Such discipline does not result in withdrawal of even conditional liberty for a long period of time. For an inmate, such liberty has already been withdrawn, and prison discipline really affects not the prisoner's liberty but rather qualitative factors bearing only marginally—and often only briefly—on the conditions surrounding the prisoner's lack of liberty. Of course, prisoners may have a relatively greater interest at stake in a good time forfeiture proceeding than in a proceeding involving segregation or transfer, just as those forms of discipline may involve a relatively more substantial interest than other sanctions such as loss of privileges or reprimand.

Prisons are closed societies of proven lawbreakers under the constant supervision and control of a limited staff. Widespread hostility and frustration make the atmosphere frequently tense and volatile. Moreover, inmates who break the "inmates' code" by providing information concerning violations risk reprisals if they are identified. Prison authorities believe that testimonial confrontations between an inmate and staff members or other inmates can be dangerous and are to be avoided whenever possible.

The government's interest in prison discipline is not limited to enforcement of the prison rules and maintenance of security. Rather, such discipline is seen as being integrally related to the larger purposes of the institution—rehabilitation of offenders and adjust-

ment of their antisocial tendencies. This relationship calls for substantial flexibility in the disciplinary process, with a wide measure of discretion vested in prison administrators, who are intimately familiar with the inmates and responsible for their rehabilitation and security. Both purposes could be undermined if inmates are free to confront and cross-examine staff members in an adversarial context.

Representation by counsel, moreover, could further interfere with the rehabilitative process by producing undesirable delays in the imposition of sanctions and by shifting the focus of imposition of discipline from rehabilitation to procedural formality.

These features of prison discipline suggest that, if any procedures are constitutionally mandated as a matter of due process, they might be less rigorous for other modes of discipline than for loss of good time, for example, and that, in any event, they ought not to and do not include rights of confrontation and cross-examination of witnesses, or the right to counsel.

The Bureau of Prisons has been engaged in a continuing process of re-evaluation of its procedures, which reflects a concern with assuring fairness and minimizing the likelihood of arbitrary action. This process has resulted in the evolutionary development of increasingly refined procedural requirements for prison discipline, with new procedures being harmonized with the goals of security and rehabilitation. The institution of new procedures ought to be left at this time to prison administrators, rather than being taken over by the courts, as the former are in a far

better position to experiment with new procedures in the unique prison setting. The ongoing process of development of new procedures should be allowed to continue without being constrained by a Procrustean constitutional mandate requiring recognition in all prisons of procedural rights not yet widely proven to be workable in the prison context.

2. If new procedural requirements are to be imposed on the prison disciplinary process, the decision should not be retroactive in effect. Prison officials have heretofore relied in good faith on the absence of an announced constitutional necessity to observe any particular set of rules in imposing discipline. Retroactive application of a decision establishing such requirements could impair the technical validity of an enormous number of disciplinary actions. For example, in the federal prisons alone there were some 19,000 disciplinary proceedings in fiscal 1973, far more than the number of federal probation and parole revocation proceedings. Yet as to the latter type of hearing, this Court made its ruling in *Morrissey* applicable only to future proceedings.

3. Petitioners challenge that part of the court of appeals' decision holding that prison officials could not ordinarily open mail from attorneys, in the inmate's presence and without reading it, in order to inspect for contraband. We contend that such a narrow right to open mail, similar to the procedure followed by Bureau of Prisons, strikes a reasonable and permis-

sible compromise between the institutional need to maintain security and to control material entering the prison, and the prisoner's interest in unrestrained communication with his attorney and access to the courts. The procedures required by the court of appeals to be followed before mail from attorneys may be opened are impractical, unnecessarily burdensome, and significantly ineffective in serving the interests of prison security, and such an inflexible rule ought not be imposed as a matter of constitutional limitation.

ARGUMENT

I. DUE PROCESS DOES NOT REQUIRE THAT THE FULL RANGE OF PROCEDURES DEEMED CONSTITUTIONALLY NECESSARY IN PAROLE AND PROBATION REVOCATION HEARINGS BE PROVIDED IN PRISON DISCIPLINARY PROCEEDINGS.

The Court's decisions in *Morrissey* v. *Brewer*, 408 U.S. 471, and *Gagnon* v. *Scarpelli*, 411 U.S. 778, established a number of procedural requirements that would thereafter be applicable to proceedings for revocation of probation or parole. Essentially, these requirements were similar in kind, although not coextensive with, many of the basic procedural requirements of criminal trials. Because of the serious consequences to the individual from revocation of parole or probation (often, as a practical matter, fully as serious as the consequences of the original conviction), due process was held to require the specified procedures to assure sufficiently reliable fact-finding

in determining the existence of a violation and establishing the appropriate sanction.

We do not question that it is also desirable to have accurate fact-finding in the context of prison disciplinary proceedings, and that is certainly one of the major objectives of the procedures established by the Bureau of Prisons for the conduct of prison disciplinary proceedings. However, the unique conditions of the prison environment and the nature of the interests served by the disciplinary process in that environment require and justify certain differences in procedures, notwithstanding that there may be a slightly increased risk of factual mistakes in a few cases. Moreover, since the impact of prison discipline on the individual, although not unimportant to him, is almost invariably far less grave than the consequences of a criminal conviction or of revocation of parole or probation, more flexible constitutional standards governing the conduct of disciplinary proceedings may be countenanced, particularly as such flexibility serves substantial governmental interests and needs.

While the record in this case does not reveal all of the variations in procedures followed by different jurisdictions in the conduct of prison disciplinary proceedings, it is quite evident that the full range of the *Morrissey-Scarpelli* requirements are not generally observed. Nevertheless, at least with respect to the procedures followed in federal prisons, we submit that constitutional due process requirements are being fully satisfied. In order to facilitate understanding

of the issue, the following table compares the *Morrissey-Scarpelli* requirements with current procedures of the Bureau of Prisons.

Morrissey-Scarpelli Procedures **	Bureau of Prisons Procedures *	
	Loss of good time ***	Other disciplinary actions
1. Written notice of alleged violation	Written notice of alleged violation	Written notice of alleged violation
2. Disclosure of the evidence against the alleged violator	Presentation or disclosure of all evidence supporting misconduct report heard or seen by Board, except that Chairman may determine that source of certain information should not be revealed if disclosure may endanger safety or well-being of another, the circumstances and reasons for such a determination to be summarized in report	Extent of disclosure of evidence in discretion of Committee
3. Opportunity to be heard in person	Inmate or representative may make opening and closing statements to Board	Inmate given opportunity to answer charges personally to investigating officer and to Committee
4. Opportunity to present witnesses	Available witnesses (staff or inmates) requested by inmate will be called if Chairman determines they are necessary for appreciation of circumstances and if their testimony would not be repetitive, with reasons for not calling noted in record	No right to present witnesses, but Committee may call investigating officer, reporting officer, or other witnesses, in its discretion, and may require further investigation
5. Opportunity to present documentary evidence	Unavailable witnesses may be asked to submit written statements; other documentary evidence will be received	Documentary evidence will be received

Morrissey-Scarpelli Procedures **	Bureau of Prisons Procedures *	
	Loss of good time ***	Other disciplinary actions
6. Right to confront and cross-examine adverse witnesses unless hearing officer finds good cause for not allowing	No right to confront or cross-examine adverse witnesses	No right to confront or cross-examine adverse witnesses
7. Neutral and detached hearing body, such as traditional parole board	Good Time Forfeiture Board (not including officers reporting or investigating the misconduct) makes a recommendation to Chief Executive Officer of institution, whose action is subject to review by Bureau of Prisons' Office of General Counsel at inmate's request	Adjustment Committee shall not include officers reporting or investigating misconduct
8. Written statement by fact-finders as to reasons for revocation	Written recommendation to Chief Executive Officer setting forth, as specifically as possible, reasons for the recommendation, with any minority report	Written report with clear statement of Committee's conclusions as to inmate's involvement in prohibited acts and action to be taken
9. Written statement by fact-finders as to evidence relied on	Written report to include record of proceedings and evidence, with indication whether Board has relied on evidence not disclosed to inmate	Written report clearly stating offense, time, location, witnesses, inmate's statement, and information on which conclusion is based, with indication whether Committee has relied on evidence not disclosed to inmate

10. Right to counsel (retained or provided by government) upon request, in those few cases where a timely and colorable claim is made of no violation or that there were substantial reasons justifying or mitigating the violations, which reasons are complex or otherwise difficult to develop or present	No right to counsel is provided, but in all cases inmate is offered assistance of staff member, who will be chosen by inmate where feasible	No right to counsel is provided

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* See Appendix, *infra*, pp. 11a-21a.

** See *Scarpelli*, *supra*, 411 U.S. at 786, 790.

*** Proceedings before the Good Time Forfeiture Board concerning loss of good time are preceded by proceedings before the Adjustment Committee and occur only where the Committee has recommended that good time be forfeited or withheld. See Appendix, *infra*, pp. 16a-17a. Accordingly, loss of good time is actually subject to the procedures in both columns.

As the table shows, many of the *Morrissey-Scarpelli* standards are met in federal prison disciplinary proceedings, particularly in the case of good-time withholding or forfeiture proceedings, which are likely to have the greatest impact on the prisoner's liberty.[4] The principal differences between the *Morrissey-Scarpelli* standards and the present federal prison procedures are in the following areas: the right to confront and cross-examine adverse witnesses; the related right to full disclosure in every case of all the evidence that may be relied on in reaching a disposition; the unqualified right to present witnesses; and the right to counsel. (Fuller accommodation of the inmate's interests in these areas is afforded, as previously indicated, in the case of good time forfeiture proceedings than in proceedings through which lesser sanctions can be imposed.)

As we shall show below, while these differences may result in some marginal lessening of reliability or fairness in some instances, such consequences are justifiable in light of the more limited impact of prison discipline on a person's liberty, the unique setting in which such disciplinary action occurs, and the

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[4] In the federal system, as in many state systems, prisoners are entitled by statute to accrue "good time" which, if not forfeited or withheld, results in an early release from the sentence being served. See 18 U.S.C. 4161 *et seq.* In addition, prisoners in the federal system (see 18 U.S.C. 4126, 4162), and many state prisoners, may earn different types of extra good time under discretionary prison rules (*cf.* Pet. App. 40). Forfeiture of good time also affects eligibility for parole (see 28 C.F.R. 2.2, 2.13), at least when the forfeited good time has not been restored (see p. 20, *infra*, n. 9).

multiple purposes of prison discipline in its relationship to that institutional setting.

That such factors must be taken into account in determining the procedures required as a matter of due process is established by *Morrissey* itself, where this Court stated that the question of "what process is due" [8] in a given set of circumstances is to be determined in light of (1) "the private interest that has been affected" and (2) "the precise nature of the governmental function involved."

In holding that the full panoply of *Morrissey-Scarpelli* procedural requirements must also be gen-

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[8] *Morrissey* indicates that the procedural requirements of due process in any given circumstances are to be determined by initially considering whether the governmental action in question results in a deprivation of "liberty" within the contemplation of the due process clause (of the Fifth or the Fourteenth Amendment), so that "some process is due." 408 U.S. at 481. Many disciplinary actions (*e.g.*, segregation, or possibly transfer or loss of certain privileges) are frequently of relatively limited duration and constitute a sufficiently marginal detriment, given the antecedent fact of imprisonment, that it is arguable that, while they may affect matters of importance to the prisoner, they do not involve a deprivation of liberty (or property) for due process purposes. One court of appeals appears to have taken such a position. See *Willard* v. *Britton*, No. 73-1369 (C.A. 10), decided February 7, 1974. But see *Myers* v. *Alldredge*, No. 72-1819 (C.A. 3), decided February 14, 1974; *Braxton* v. *Carlson*, 483 F. 2d 933 (C.A. 3); *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701 (C.A. 7); *Sostre* v. *McGinnis*, 442 F. 2d 178 (C.A. 2) (*en banc*), certiorari denied *sub nom. Sostre* v. *Oswald*, 404 U.S. 1049. Believing that the procedures of the Bureau of Prisons amply satisfy any applicable due process requirements, we proceed here on the assumption that "some process is due" in the imposition of serious prison discipline.

erally followed in any prison disciplinary proceedings that may result in the imposition of "substantial" or "serious" penalties, "such as incarceration in a dry cell or solitary confinement," and, apparently, loss of good time[6] (Pet. App. 3-4, 6), the court of appeals did not undertake the analysis required by *Morrissey* and failed to consider the crucial distinctions between the purposes, setting and consequences of prison disciplinary proceedings and those of revocation of parole or probation.[7]

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[6] Although the opinion below is not entirely clear on this point, the court of appeals seems to have held that proceedings involving loss of good time must satisfy the *Morrissey-Scarpelli* requirements, but that, in view of *Preiser* v. *Rodriguez*, 411 U.S. 475 (requiring that challenges to the duration of confinement be made in habeas corpus proceedings), the district court was limited in the relief it could grant in this action and could not restore good time (Pet. App. 5-7; 483 F. 2d at 1063-1064).

[7] Because petitioners conceded below that revocation of good time is subject to minimal due process requirements and contend that the question of good time "is no longer in the case" (Pet. Br. 22-23; see Pet. Br. 11; see also p. 18, *supra*, n. 6), the question presented here concerns due process requirements only in prison disciplinary proceedings resulting in "serious" or "substantial" penalties other than loss of good time. However, we do not join in petitioners' concession regarding good-time forfeiture proceedings insofar as it may be taken to mean that proceedings resulting in loss of good time must include procedures beyond those now provided by the Bureau of Prisons' rules.

A. Prison Disciplinary Proceedings Affect Substantially More Limited Private Interests than Does Revocation of Parole or Probation, so that Less Stringent Procedures Need be Required.

In *Morrissey* the Court observed that "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievious loss' on the parolee and often on others." 408 U.S. at 482. "Though the State properly subjects [the parolee] * * * to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison." *Ibid.* It is thus a "serious deprivation" (*Scarpelli, supra*, 411 U.S. at 781) to have one's parole or probation revoked, with long-term consequences comparable to a new conviction.[8] Moreover, the seriousness of such a decision is compounded by the question whether revocation is "unnecessarily interrupting a successful effort at rehabilitation" and whether non-revocation would be "imprudently prejudicing the safety of the community." *Id.* at 785. It was in such a context that this Court decided the content of the various due process requirements that have to be met before revocation was justified. The Court indicated that it would be an entirely different matter to extend these requirements to the prison setting—

[8] Upon revocation of parole or probation, the parolee or probationer must ordinarily return to or enter prison to serve the balance of the original sentence (or such sentence as may then be imposed, if none had previously been imposed (see, *e.g.*, 18 U.S.C. 3653, 4205)). The ensuing period of incarceration may well exceed the time, if any, already served. For

where authorities have the problem of "controlling a large group of potentially disruptive prisoners in actual custody." *Morrissey*, *supra*, 408 U.S. at 483.

Inherent in the very nature of imprisonment is the deprivation of the prisoner's liberty, although the degree of that deprivation may vary depending on the nature of the institution in which the prisoner is incarcerated, the term of imprisonment, other conditions contained in the sentencing authority's determination, and a variety of other factors. Unlike the outside world, the prison environment is typically a closed society in which a number of inmates reside involuntarily in close, round-the-clock proximity, often for substantial periods of time, under the supervision and control of a limited number of prison staff members. For prisoners, as this Court has noted, "eating, sleeping, dressing, working, and playing are all done under the watchful eye of the [government] * * *." *Preiser* v. *Rodriguez*, 411 U.S. 475, 492.

One in prison, therefore, in contrast to a parolee or probationer, has already, through due process of law, been deprived of liberty in the most pervasive manner. Cf. *Price* v. *Johnston*, 334 U.S. 266, 285. None of the principal varieties of prison discipline (with the possible exception of a loss of good time [9])

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example, in *Morrissey* one parolee had at least six years of a seven-year sentence remaining, and the other had at least eight years remaining on a ten-year sentence. In *Scarpelli* the probationer had a fifteen-year sentence to serve.

[9] We note that, unlike revocation of parole or probation, loss of good time may only involve a matter of days and need

even remotely approaches in magnitude the deprivation of liberty confronting one forced to go from free society to prison, even though to the inmate the imposition of discipline may be of "major concern." Cf. *Board of Regents* v. *Roth*, 408 U.S. 564, 570.

B. The Multiple Purposes and Unique Institutional Setting of Prison Discipline Require More Flexible Procedures than for Revocation of Parole or Probation.

The current rules of the Bureau of Prisons concerning prison discipline are the product of an ongoing evolutionary process. (Pertinent aspects of the history of the federal prison system and the development of the current rules are set forth in the Appendix to this brief.) In developing these rules, the Bureau of Prisons has attempted to take into account the purposes which prison discipline is intended to serve and the unique institutional setting in which it occurs. The result has been a cautious but steady augmentation and refinement of the procedural rights extended to inmates.

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not have a substantial effect on a prisoner's liberty. For example, under Bureau of Prisons procedures only the good time creditable in the month of a violation may be withheld without the more elaborate procedures pertaining to a forfeiture of good time (see Appendix, *infra*, pp. 16a-17a), and the maximum amount of good time that can be earned in one month is about fifteen days, depending upon the length of the sentence being served. 18 U.S.C. 4161, 4162. Whether good time is forfeited or withheld, moreover, it may be totally restored before it has had any adverse impact on the date of the prisoner's eventual release. See, *e.g.*, *Meyers* v. *Alldredge*, *supra* (situation of plaintiffs Moore and McAllister described in Appendix to opinion). See generally Appendix, *infra*, pp. 20a-21a.

The following discussion of factors bearing on the decisions made by federal prison authorities in establishing those rights is not intended to suggest that the Bureau of Prisons has a monopoly on wisdom in these matters, nor that arguments cannot be made in support of a different array of procedures. It is intended, rather, to show that the current rules represent a reasoned and reasonable accommodation of conflicting interests, developed by the authorities who bear the heavy burden of maintaining order in a closed society of atypically disorderly people and of attempting to rehabilitate those people through adjustment of their antisocial tendencies. We submit that the judgment of the expert administrators on these questions is entitled to considerable weight.

(1) ***The unique institutional environment of prisons.***

Prisons differ from the free society of the world outside in many significant respects. They are populated by a group of people who have not chosen to be there, but rather have been deprived of their liberty by the authority of the state because they have been found to have violated one or more of the laws established by society for its orderly governance. Indeed, an unfortunately large number of inmates are in prisons not for the first time.[10] The range of offenses

[10] For example, according to the as yet unpublished annual report of the Bureau of Prisons for fiscal 1973, more than 60 percent of the inmates in federal prisons at the end of that year had at least one known prior commitment to a state or federal prison (based on a prior conviction) and 30 percent had at least three or more such prior commitments. Nearly

for which they have been committed is broad, including many serious crimes of violence, escape from custody, bribery, extortion, and the like. By definition, prison inmates share the characteristic of having one or more times resorted to seriously illegal means to achieve their goals or to resolve problems confronting them. In many cases, moreover, the prior offenses will provide grounds for legitimate concern that the inmate might try to interfere improperly with the course of disciplinary proceedings against him.

Many inmates enter prison with feelings of hostility and frustration, perceiving themselves to have been innocent or unfairly convicted, whether or not any objective observer would agree. Such a refusal to accept guilt for wrongdoing and a concomitant tendency to project blame on others are often seen in prisoners' attitudes towards events occurring in prison and their responsibility toward them. See, *e.g.*, Halleck, *Psychiatry and the Dilemmas of Crime* 306 (1st ed. 1967); Abrahamsen, *The Psychology of Crime* 110 (1st ed. 1960).[11]

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10 percent, moreover, were confined because of violation of the terms of parole or mandatory release. A further unknown proportion of inmates had prior convictions for which they had not been committed. The apparently high rate of recidivism is, of course, not indicative of the results following release from a *federal* prison.

[11] Refusal to accept guilt for any wrongdoing may be especially prevalent in a penitentiary, where there are older, more criminally sophisticated offenders. Thus, disputation of the charges and emotional confrontations are likely to be especially frequent in prison hearings. See, *e.g.*, Halleck, *supra*, at 110.

Moreover, the constant exposure of prisoners to the supervision and control of the prison staff in this setting may tend, not infrequently, to breed hostility and tension between the two—to a greater extent and with a sharper focus than in almost any setting in the outside world. The characteristics of prison life and inmate-staff relationships in many prisons (though not necessarily all federal prisons) thus include an ever-present potential for explosive confrontations in which the prisoners give vent to hostilities and frustrations or members of the staff overreact due to their sense of belonging to a beleaguered, alienated, and often disliked minority having only a tenuous control over the situation. Cf. *Edwards* v. *Sard*, 250 F. Supp. 977, 981 (D.D.C.).

Testimonial confrontations can usually be handled fairly well in free society. There, the relationships between the individual and witnesses opposing him, and the hostilities arising from the confrontation experience, may ordinarily be diffused in numerous ways—sometimes by the action of the hearing official or other authorities, but more often by the fact that the individual affected, and others who have confronted him, may return to their respective homes, avoiding further contact and venting their emotions in less explosive surroundings.

Diffusion of antagonisms occurs less readily in the typical prison setting, where the parties always remain in close proximity to each other and where many inmates are characteristically impulsive and action-oriented. See Halleck, *supra*, at 284; Eysenck, *Crime and Personality* 144 (1964). Hostilities

sparked in a disciplinary hearing may easily be fanned into flames of violence or mutiny in the close confines of the prison.

In the case of staff witnesses, the supervisory counseling relationship essential to achievement of correctional goals may be disrupted or destroyed by the confrontation experience. Moreover, confrontation might place the inmate in a position of equal contest with the correctional officer and thereby permit an erosion of the officer's control and authority. See McCorkle, *Guard-Inmate Relationships in Prison*, in *The Sociology of Punishment and Correction* 108-110 (Johnston, Savitz & Wolfgang ed. 1962). The effect of confrontation would perhaps be even more drastic in the case of the inmate witness who has observed or been the victim of misconduct by another prisoner. The subsequent animosity which might result from a confrontation in a disciplinary hearing would continue in the close confines of the prison and might in many circumstances result in violent retribution or the need to make extraordinary provision for the protection of the inmate-witness. See President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 46 (1967).[12]

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[12] A widely noted phenomenon representing a psychological response to the peculiar demands of prison life is the unwritten "inmates' code," one of the first principles of which is that "inmates stick together" and that those who breach the code risk reprisals. See generally Kassebaum, Ward & Wilner, *The Inmate Code and Attitude Change*, in *Prison Treatment and Parole Survival: An Empirical Assessment*, ch. VI (1971);

One conclusion that may be drawn from consideration of the prison environment, accordingly, is that direct confrontations between inmates and staff, as well as between inmates, are to be avoided wherever possible. Otherwise, "prisons, by their very nature packed with intensive emotional problems, would be kept at a perpetual boiling point * * *." *Braxton* v. *Carlson*, 483 F. 2d 933, 941 (C.A. 3).

(2) *The integral relationship between the rehabilitative purpose of imprisonment and the role of discipline.*

The role of discipline in prisons today reflects a series of evolutionary changes over the past 200 years which have occurred as a result of changes in public policies and attitudes toward the role of prisons themselves—an evolution which is certain to continue even without the imposition of specific constitutional constraints on the operation of prisons. The history of this development (set forth in greater detail in the Appendix to this brief) reveals that, as the purposes to be served by imprisonment have changed, so have the nature and role of discipline within the prisons.

Imprisonment is now seen more than previously as having as a major purpose the rehabilitation of the inmate through affirmative programs such as counseling and training. Cf. *Williams* v. *New York*, 337 U.S. 241, 248-249, n.13. In this more sophisticated concept, institutional discipline is seen by prison officials as no longer serving only the narrow purpose of

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Sykes & Messinger, *The Inmate Social Code and its Functions*, in *The Sociology of Punishment & Correction*, *supra*, ch. 14.

maintaining order within the prison. It is also intended to serve the larger goals of the institution as a whole—*i.e.*, to develop self-reliance, self-control, self-respect, and self-discipline, not merely the ability to conform to institutional rules and regulations but the ability and desire to conform to accepted standards of individual and community life in a free society. See Eysenck, *supra*, at 144-161.

Thus, it is now widely agreed by correctional authorities that

> [d]iscipline * * * looks beyond the limits of the inmate's term of confinement. It must seek to insure carry-over value by inculcating standards which the inmate will maintain after release. It must always be objective and must develop in the inmate personal responsibility to that social community to which he will return. [American Correction Association, *Manual of Correctional Standards*, ch. 24.7.]

Accordingly, the stated goals of inmate discipline are now largely synonymous with those of the correctional process itself, *i.e.*, modification of the criminal value system. Richmond, *Prisoner Management and Control* 14 (1969).[13]

To maximize rehabilitation, many prison authorities believe that the disciplinary process should mini-

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[13] It has been said that "[t]he administrative manipulation of rewards, favors, privileges, and punishments with a view to promoting changes in value identification" is "a central administrative objective" in obtaining a shift in the inmate's value orientation. Ohlin, *Modification of the Criminal Value System*, in *The Sociology of Punishment and Correction*, *supra*, at 179.

mize as much as possible the alienation of the offending inmate from the staff and from his fellow inmates; should promote in him a clear regret for having committed the offense; and should offer him a course of conduct which will allow his restoration to good standing. Glaser, *The Effectiveness of a Prison and Parole System* 121 (1969). Working upon these hypotheses, the Bureau of Prisons and many state systems have adopted procedures which interrelate discipline with effective counseling, whereby discipline serves to a significant extent as a part of the entire correctional process and is not necessarily limited to the individual instance of misconduct.[14]

In establishing and modifying a disciplinary system, prison officials believe they must tread a difficult middle ground between procedures and programs that may be so strict as to be unfair and counterproductive and those that do not embody sufficient control to achieve their ends. In articulating the need to maintain this delicate balance, one experienced prison official has observed:

> The evil effects of harsh discipline are readily recognized. Brutal punishments have been tried and found wanting. Lax discipline can be equally injurious to the morale of the prisoners and even

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[14] In the view of Dr. Glaser (*id.* at 122-123), a system of flexible rules and constructive penalties requires

> a government of men, not laws, in the prison, which might seem against the American governmental tradition. However, it is appropriate to deviate partially from this tradition in a prison which achieves its primary goal, that of rehabilitating offenders, through relationships between staff and inmates.

> more injurious to the maintenance of security and good order. The prisoner frequently has the same Beccarian concepts of punishment as the layman in a free society [referring to the utilitarian philosophy of Beccaria, the eighteenth century Italian criminologist]. The prisoner who wants to do his time and get it over with has little liking for a prison where he can find no sense of direction in a maze of favoritism, prison politics, variable rules, indefinite procedures in discipline, and the hypocrisies that underlie weak administration. [McKendrick, *Custody and Discipline*, in *Contemporary Correction* 169 (Tappan ed. 1951)].[15]

The prison disciplinary process has also been said to involve other important practical factors—including the need for correctional officials to sustain their authority and the need in many cases for quick and simple decisional procedures[16]—which may militate

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[15] While some commentators attribute prison riots and disorders to "repressive" disciplinary practices and other abuses, research indicates that in many instances these problems stem from administrative weakness. As Professor Tappan has noted:

> It is only too clear that appeasement of rioting inmates in some penal institutions has stimulated riots in others. The discovery that threats, violence, and destruction may gain concessions has had anomalous consequences. Riots have produced some changes in prison programs and, incidentally, have provided fictitious color of accuracy to the contention that abusive conditions incited the riots. [Tappan, *Crime, Justice and Correction* 701-702, n. 68 (1960).]

See also McCorkle, *supra*, at 108-109.

[16] Many behavioral scientists have emphasized that discipline generally should closely follow the violation if it is to

against the application of the full panoply of due process protections that are required in some non-prison contexts. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 12-13 (1967).

To reconcile these interests, many correctional systems, including the Bureau of Prisons, have adopted flexible hearing procedures more informal in significant respects than those of a criminal trial.[17] These procedures represent an effort to balance important and to some extent conflicting goals: on the one hand, the need for expeditious and non-inflammatory resolution of misconduct reports; on the other, the goal of reducing the risk of unfair, arbitrary, or factually unfounded disciplinary action.

One measure of flexibility in prison discipline consists of the increasingly wide range of potential sanctions which have resulted from the changes that have

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be effective in behavior modification. See generally Bandora, *Principles of Behavior Modification* (1967); Krasner & Ullman, *Research in Behavior Modification* (1965); Skinner, *Science and Human Behavior* (1953).

[17] Flexibility in approach and procedures is a key element in the correctional context. As one observer has noted:

> [O]bjectionable behavior by men in prison is so diverse that no set of rules could encompass it without being long, complex, and difficult to apply, or so arbitrary that it would arouse resentment by dealing similarly with highly diverse acts. It follows that strain in inmate-staff relationships is minimized by a policy of flexible rules interpreted to fit each case which takes into account primarily the effect of each penalty on the future behavior of the offender. [Glaser, *supra*, at 120-121.]

occurred in the general method of operations of prisons. When, a century ago, all prisoners lived essentially in segregation, there were few alternatives to the corporal punishment that was widely imposed as the chief mode of discipline. As prison life has become more humane, the disciplinary options have increased in number, variety and range of seriousness. Some misconduct may of course itself be the basis for criminal prosecution. See, *e.g.*, 18 U.S.C. 751, 1114, 1791-1792. In addition, the choices of prison-administered discipline now include forfeiture or withholding of good time (perhaps the most serious); placement in segregated status; transfer to another institution; loss of privileges such as recreation time, television viewing, or participation in special events; informal reprimands by the staff. See McKendrick, *supra*, at 168.

In view of the emphasis placed in prison discipline on rehabilitation and adjustment of the inmate's attitudes, the attendant value of promptness in the imposition of disciplinary action and flexibility in its selection, and the likelihood that direct, adversarial confrontations will seriously interfere with the rehabilitative process, there are substantial considerations weighing against extension of all the *Morrissey-Scarpelli* requirements to this very different context.

(3) ***Recognition of rights to counsel, confrontation of witnesses and disclosure of all evidence might seriously impair prison security and the efficacy of the prison disciplinary process.***

From the foregoing discussion of the role of discipline in the unique prison environment, several substantial reasons emerge for the decision of prison officials not to extend to all prison disciplinary proceedings the full panoply of procedures outlined in *Morrissey* and *Scarpelli*. The introduction of rights to confront all witnesses and to be assisted by an attorney is likely to convert prison disciplinary proceedings into mini-trials, with a consequent distraction of attention from the rehabilitative focus of such proceedings, as well as a potential detriment to the important function of maintaining discipline.[18]

In *Scarpelli* this Court noted various respects in which "[t]he introduction of counsel into a [parole or probation] revocation proceeding will alter significantly the nature of the proceeding" (411 U.S. at 787-789), and concluded that "the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings * * *." *Id.* at 790. In reaching this conclusion, the Court observed (*id.* at 787-788):

> If counsel is provided for the probationer or parolee, the State in turn will normally provide

[18] To paraphrase this Court's description of the somewhat analogous matter of military discipline through courts-martial, a prison disciplinary proceeding is not "an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which * * * [prison] discipline is preserved." *O'Callahan* v. *Parker*, 395 U.S. 258, 265.

its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself, aptly described in *Morrissey* as being 'predictive and discretionary' as well as factfinding, may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate other than to continue nonpunitive rehabilitation. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial.

Such considerations apply *a fortiori* to prison disciplinary proceedings, in which the prisoner has a significantly lesser private interest at stake than does a parolee or probationer facing revocation. Apart from the inevitable transformation in the nature of the proceedings by virtue of the presence of counsel, a requirement of counsel will also introduce a significant element of delay. Indeed, prisons are frequently in isolated locations, so that a requirement to await counsel, whether retained or provided by the government, would tend to result in delays over and above such delays as might result from actions taken by counsel and from the generally increased formali-

zation of the proceedings. The Bureau of Prisons is of the view that delay in the determination and imposition of disciplinary action is undesirable and tends to interfere with the efficacy of the action taken in serving its rehabilitative and other purposes. In other words, the balance has been struck against participation by counsel largely because of an assessment that the potential gain in accuracy of factfinding is outweighed by other important and legitimate considerations.

The right to confront all witnesses and to have all evidence disclosed is limited in prison disciplinary proceedings not only to protect witnesses from reprisals, but also to minimize the frequency of confrontations between inmate and staff or among inmates. As noted above, prison officials believe that such confrontations not only may interfere with the rehabilitative process but also are likely to result in increased tension and hostility between those involved, which might lead to further misconduct or disorder, possibly of a more serious nature.

Finally, we note that a general confrontation requirement could have undesirable consequences extending beyond those instances in which confrontation actually occurs, since the effect of such a requirement will surely be to discourage inmates from reporting disciplinary infractions to prison authorities (the knowledge that they will be openly identified as violators of the "inmates' code" (see p. 25, *supra*, n. 12) will operate as a powerful deterrent). This result would prevent the needed imposition of disci-

pline in many situations and could contribute to a measurable decline in the security of the inmates and in the general level of discipline in the institution. While, in the case of proceedings leading to a criminal conviction or (to a lesser extent) revocation of probation or parole, it may be constitutionally impermissible to allow action to be taken on the basis of evidence supplied by unconfronted witnesses, the radically different balance of circumstances in the prison discipline context necessitates a more flexible constitutional standard."

Most of the courts of appeals that have considered the issue have concluded that the full range of procedural requirements set forth in *Morrissey* and *Scarpelli* should not be imposed upon prison disciplinary proceedings. See *Meyers* v. *Alldredge*, *supra*;[20] *Willard* v. *Britton*, *supra*; *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701 (C.A. 7); *Adams* v. *Carlson*, 488 F. 2d 619 (C.A. 7);[21] *Sostre* v. *McGin-*

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[19] In *Sostre* v. *McGinnis*, *supra*, 442 F. 2d at 196, the court observed, in rejecting a requirement of confrontation of witnesses, that prison disciplinary proceedings "should not be viewed as adversarial in the same sense that a criminal trial is adversarial," and that "[t]o dispose sensitively and carefully of each prisoner's unique case with due regard for the effect of each decision on the total fabric of the prison community, prison authorities must have wide access to relevant information." See also *Williams* v. *New York*, *supra*.

[20] In *Meyers*, the Third Circuit rejected claims that confrontation, cross-examination and the right to counsel are necessary procedural safeguards at prison disciplinary hearings involving forfeiture of good time.

[21] In *United States ex rel. Miller* v. *Twomey*, *supra*, the Seventh Circuit expressed "disagreement with the proposition

nis, supra. As the Third Circuit pointed out in *Braxton* v. *Carlson, supra,* 483 F. 2d at 941:

> [T]he focus of the Adjustment Committee function is rehabilitative rather than punitive. We believe, therefore, that the transformation of this informal hearing into a formal adversary proceeding with the full panoply of counsel, cross-examination, witnesses, and written record could be self-defeating. * * *

In *Braxton*, the court held that any due process safeguards should be directly related to the prison disciplinary setting. Characterizing as erroneous the assumption that prison disciplinary proceedings are adversarial in the same sense as is a criminal trial, the court stated that "[d]ue process in a correctional institution setting should not be 'so rigid as to re-

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that whatever procedural safeguards are required for a parole (or probation) revocation hearing are also necessarily applicable to an in-prison disciplinary hearing." 479 F. 2d at 716, n.31. Accordingly, the court held that there is no absolute right to confront or cross-examine witnesses and said it was doubtful that counsel or a lay substitute is essential. *Id* at 715. The court held, however, that due process requires at least that a prisoner receive advance written notice of the charges against him and be afforded a fair opportunity to explain his version of the events (possibly including a right to insist that witnesses be called or interviewed) and that the factual determination must not be made by the officer who reported the infraction. *Id.* at 715-716. These requirements are substantially met under present Bureau of Prisons' procedure. In *Adams* v. *Carlson, supra,* the Seventh Circuit held that the standards of *Miller* applied to prior disciplinary actions in a federal prison and remanded the case to the district court to determine whether the *Miller* standards were satisfied and whether they should be enlarged.

quire that the significant interests of informality, flexibility, and economy must always be sacrificed.'" 483 F. 2d at 940 (quoting *Scarpelli*, 411 U.S. at 788).

The court went on to express what we consider to be essentially the correct view of the governing constitutional standards (*ibid.*):

> In light of the combined goals of fact determination and correctional treatment and rehabilitation intrinsic in the Adjustment Committee's tasks, we agree with the Second Circuit that due process is present when facts are rationally determined in a proceeding where the prisoner (1) is notified of the accusation and informed of the evidence against him, and (2) is afforded a reasonable opportunity to explain his actions [citing *Sostre*, *supra*].

Finally, the question of procedural requirements for the administration of prison discipline is, we respectfully submit, one that courts should approach with a full awareness of its complexity and of the limitations that exist on the ability of the judiciary to deal in detail with the problem at this time, given the present state of knowledge on the subject. As the Second Circuit observed in *Sostre* (442 F. 2d at 197; footnote omitted):

> It would be too simplistic to dissociate the impact of punishment meted out after a disciplinary hearing from the method by which the hearing itself is conducted. As one court has observed: "The association between men in correction institutions is closer and more fraught with physical danger and psychological pressures

than is almost any other kind of association between human beings." *Edwards* v. *Sard*, 250 F. Supp. 977, 981 (D.D.C. 1966). It is sad but true that the study of the prison subculture by psychologists and sociologists has until recently been largely neglected. Those who have looked into the problem, however, do not gainsay the volatility of relationships among prisoners and prison officials. * * * We would not presume to fashion a constitutional harness of nothing more than our guesses. It would be mere speculation for us to decree that the effect of equipping prisoners with more elaborate constitutional weapons against the administration of discipline by prison authorities would be more soothing to the prison atmosphere and rehabilitative of the prisoner or, on the other hand, more disquieting and destructive of remedial ends. This is a judgment entrusted to state officials, not federal judges.

We are particularly unwilling to interfere with state administrative processes when reliable, detailed information or empirical studies are as scanty as they are on the subject of prison disciplinary procedures. * * *

Moreover, the suggested deference to the experience of those charged with the administrative responsibility for devising and operating the prison disciplinary system [22] is supported by the knowledge that the Bu-

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[22] In this connection, we concur with petitioners' contention that the court of appeals erred in directing that the district court adopt the appropriate due process standards without first permitting prison officials an opportunity to formulate suitable guidelines. In our view, the proper initiators

reau of Prisons, like other prison systems, has been engaged in a careful but steady development of added procedures beneficial to the prisoner yet consistent with the unique demands of the prison environment and the multiple purposes of prison discipline (including, most recently, a new federal prison grievance procedure; see Appendix, *infra*, pp. 21a-23a). This developmental process, reflecting experience with prior changes, evolving public policy towards prisons, and expanding knowledge of the social dynamics of the prison community, ought not be rigidly circumscribed by inflexible procedural requirements imposed at this time as a matter of constitutional mandate.[22]

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of change in existing procedures are the professional prison administrators and not the courts. We do not mean to suggest that federal courts must abstain altogether from eliminating arbitrary or inadequate procedures; rather, we suggest that prison officials should be given the initial opportunity to adopt sufficient safeguards. As the Third Circuit properly observed with regard to the role of the courts in formulating affirmative guidelines for prison administrators: "Our expertise is limited; our knowledge of the extensive day to day prison problems is minimal; our ability to foresee the effect of procedural changes on treatment, rehabilitation and programmatic process is imperfect." *Braxton* v. *Carlson*, *supra*, 488 F. 2d at 942; see *Gittlemacker* v. *Prasse*, 428 F. 2d 1, 4 (C.A. 3); see also *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 488-489; *Sostre* v. *McGinnis*, *supra*, 442 F. 2d at 205.

[22] We believe that there are likely to be special problems attendant upon overly rapid introduction of change into the prison environment. The maintenance of good order and the security of guards and inmates alike in a frequently hostile prison environment depend substantially on the existence of rules of conduct and established procedures for the prison, as well as on physical means such as walls and locks. Prison

II. PAST PRISON DISCIPLINARY ACTIONS SHOULD NOT BE INVALIDATED FOR FAILURE TO COMPLY WITH ANY NEW PROCEDURAL REQUIREMENTS THAT MAY BE ANNOUNCED IN THIS CASE.

The court of appeals held, without discussion of the issue, that prison disciplinary proceedings antedating its own decision and even this Court's decisions in *Morrissey* and *Scarpelli* must be set aside, and the records of misconduct expunged, whenever the proceedings did not satisfy the procedural requirements for revocation of parole and probation announced by the Court in *Morrissey* and *Scarpelli* (Pet. App. 7; 483 F. 2d at 1064).[24] We believe that

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staff members often prefer that strict rules be maintained and enforced, and may tend to feel threatened and weakened by changes in prison rules which appear to favor the prisoners. Prisoners, on the other hand, may feel that, once a rule has been changed in a way they perceive as favorable, the new rule is a matter of right, the revocation or alteration of which is likely to engender new hostilities. While neither of these opposing considerations should be the exclusive determinant of whether rules should be changed, they both caution against unduly frequent and possibly temporary or experimental changes in prison rules. It is the view of the Bureau of Prisons that significant changes in such rules should be preceded by careful consideration of the ramifications for all aspects of the unique prison environment, and that experimental changes, if necessary, should be made on a limited basis before being widely applied to all of the varied prison settings. See, *e.g.*, Appendix, *infra*, pp. 21a-23a.

[24] Since the court of appeals announced this broad expungement consequence of its holding without any analysis or discussion of the retroactivity question, it is not clear whether it meant its holding to encompass a general principle of retroactivity or to apply only to the litigants in this case (either

the court of appeals erred in this regard insofar as its decision may be viewed as adopting a principle of retroactivity, and that any decision by this Court imposing procedural requirements on prison discipline ought not to be retroactive in effect.

We submit that the question of retroactivity of new procedural rules affecting inquiries into infractions of prison discipline is effectively foreclosed by this Court's ruling in *Morrissey* that the due process requirements there announced were to be "applicable to *future* revocations of parole" (408 U.S. at 490; emphasis supplied).[25] There is no rational basis for giving retroactive application to any due process standards for prison disciplinary proceedings that may be announced in this case when such effect has not been accorded the rules regarding parole and probation revocation proceedings. On the contrary, the reasons for limiting such rules to prospective effect are even more compelling in this area.

This Court has delineated several factors which are relevant in determining whether rulings should be applied retroactively or prospectively: (a) the

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the individuals or the entire class of prisoners at the Nebraska Complex). Our concern is with the possibility that the holding is to be construed to apply a broad retroactivity principle, and we address ourselves solely to the issue of general retroactivity and not to any question regarding the scope of relief appropriate for these litigants, including the propriety of expungement as a remedy.

[25] We note that the issue of retroactive application of the *Morrissey* standards was presented to this Court last term, but the Court declined review. See *Landman* v. *Carlson*, 463 F. 2d 218 (C.A. 5), certiorari denied, 410 U.S. 985.

purpose to be served by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of new standards. See, *e.g.*, *Linkletter* v. *Walker*, 381 U.S. 618, 629, 636; *Tehan* v. *Shott*, 382 U.S. 406, 410-418; *Johnson* v. *New Jersey*, 384 U.S. 719, 726-727; *Stovall* v. *Denno*, 388 U.S. 293, 297; *Desist* v. *United States*, 394 U.S. 244, 249; *Michigan* v. *Payne*, 412 U.S. 47, 55; *Gosa* v. *Mayden*, 413 U.S. 665.

With respect to the "purpose" criterion, there is no meaningful distinction between the purpose of the *Morrissey-Scarpelli* rules (that "the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior," *Morrissey*, *supra*, 408 U.S. at 484) and the purpose that would impel the Court to enunciate particular due process requirements for prison disciplinary proceedings—presumably a desire to reduce the likelihood that disciplinary measures will be undertaken on the basis of mistaken conclusions regarding the pertinent facts. If this concern was not sufficient to require retroactivity in *Morrissey*, it is difficult to see how it could possibly justify retroactivity in the instant case, where, as previously argued, the interests that would be harmed by action based on factual error are of reduced magnitude in comparison with the imprisonment of an individual resulting from revocation of parole.

The factor of governmental reliance militates with equal force in *Morrissey* and here in support of prospectivity. Prior to *Morrissey*, state and federal prison authorities had no reason to suspect that such procedures as they followed in imposing discipline might be constitutionally deficient. Procedures were developed as a matter of policy, not of constitutional necessity. Even after the decisions in *Morrissey* (June 29, 1972) and *Scarpelli* (May 14, 1973), prison officials have had ample grounds for good faith reliance upon the pre-*Morrissey* assumptions, because numerous courts have held that the *Morrissey* procedures were not applicable to prison discipline. See cases cited at pp. 35-36, *supra*. Thus, to the extent that reasonable governmental reliance on the validity of the old procedures supports prospectivity, it is fully applicable here.

It is in consideration of the third criterion—the effect of retroactivity on the administration of justice—that the need for prospectivity emerges most clearly. *Morrissey* recognized the severe disruption to state and federal correctional systems that would follow the retroactive imposition of procedural requirements not previously mandated or widely followed. The same considerations apply with even more compelling force in the area of prison disciplinary proceedings. We are informed that during fiscal 1973, the United States Board of Parole conducted 1173 parole revocation hearings and there were 2023 federal probation revocation hearings. During the same period, however, the Federal Bureau of Prisons held

approximately 19,000 misconduct hearings.[28] The impact of retroactive application of standards relating to misconduct hearings would therefore be enormous. As a practical matter, the result could be complete expungement of all records of prison disciplinary proceedings, since it would be virtually impossible to undertake reconsideration of such a vast volume of cases.

One serious consequence of such a development would be a material impairment of the functioning of the parole system. Congress has made eligibility for parole turn specifically on a showing that the prisoner "has observed the rules of the institution in which he is confined." 18 U.S.C. 4202. Wholesale expungement of records of disciplinary actions would make it impossible to determine whether this requirement has been satisfied in the case of any particular applicant for parole. While the Board of Parole could (and presumably would have to) proceed on the fiction that every prisoner has satisfactorily observed the rules of his institution, it can hardly be supposed that action taken on this basis will assist the Board of Parole in accurately judging whether

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[28] There were approximately 18,000 Adjustment Committee hearings and 1,000 Good-Time Forfeiture Board hearings. While this might suggest at first glance that most of the 23,000 federal prison inmates are involved in disciplinary proceedings during any given year, that is not in fact the case. Most inmates are rarely, if ever, involved in such proceedings; a small minority with severe adjustment and behavior problems, on the other hand, are repeatedly involved in disciplinary problems and account for a substantial portion of these proceedings.

"there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and * * * such release is not incompatible with the welfare of society * * *." 18 U.S.C. 4203(a).

Of course, if the Court does hold that procedures such as those utilized by the Bureau of Prisons for the conduct of disciplinary proceedings have been constitutionally defective, such a holding would have to flow from a concern that existing procedures entail an excessive risk of unjustified imposition of disciplinary measures in some cases. In those cases there would, in turn, be an enhanced risk of unjustified denial of parole. But these would still be a substantial minority of the cases; in the vast majority of cases, the existing procedures would still have reached entirely correct and justified results—results that society has a significant interest in considering insofar as they bear on such important matters as the granting of parole. A balance must be struck, and, in this area, we submit that the balance is decisively weighted in favor of non-retroactivity.

III. PRISON OFFICIALS SHOULD BE PERMITTED TO INSPECT INCOMING MAIL FROM ATTORNEYS FOR THE LIMITED PURPOSE OF DETERMINING IF IT CONTAINS CONTRABAND.

The instant case also presents an important question regarding the authority of prison officials to open (but not read)[27] incoming mail from attorneys

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[27] Although the Nebraska prison regulations in effect when the suit was commenced authorized the opening and reading of all incoming and outgoing mail (Pet. App. 34), it should

to inspect for contraband. The court below affirmed that portion of the district court's order which held (Pet. App. 11; 483 F. 2d at 1066):

> [I]ncoming mail may be opened only if manipulation of the envelope, use of fluoroscopes and metal detectors or other alternate means fail to disclose contraband and there is a real possibility that contraband will be included in such mail * * *.

We agree with petitioners that this holding represents an unrealistic approach to attorney-inmate correspondence and poses serious problems for prison security.

Pursuant to policies presently in effect, the Bureau of Prisons does not open or inspect correspondence from inmates addressed to an attorney.[25] With respect to incoming mail, however, correspondence addressed to an inmate by an attorney may be opened, solely for the purpose of inspection for physical contraband, even though there may be no special or particular basis for suspicion. This mail is neither read nor copied by the prison authorities. In addi-

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be noted that the petition raises only the narrow question whether the restrictions imposed by the court below on the opening of mail from attorneys, in the inmate's presence, to inspect for contraband without reading the mail, were justified (Pet. 15-16; see Pet. Br. 45-46).

[25] Attached to the inmate's letter is a statement from the chief executive officer of the institution advising counsel (1) that the facility retains the right to open mail from attorneys to inspect for physical enclosures constituting contraband, (2) that such mail will not be read or copied, and (3) that inspection will be conducted in the presence of the inmate, if the attorney so indicates on the envelope.

tion, inmates are advised that, at their option, and with the concurrence of their attorney, mail from the attorney will be opened only in the inmate's presence. The incoming correspondence is immediately stamped upon arrival to show date and time of receipt. When the inmate elects to have the mail opened in his presence, the contents are marked to show time of delivery. Bureau of Prisons, Policy Statement 2001.2B, "Access to Legal Reference Materials and Legal Counsel and Preparation of Legal Documents," issued May 8, 1972.

It is axiomatic that prison authorities may not, through correspondence regulations, hamper an inmate's access to the courts. *Ex parte Hull*, 312 U.S. 546. We agree that correspondence with counsel is an essential element of that access. However, limited inspection of incoming mail from counsel, as conducted under current federal rules, does not unduly infringe on these principles and does not, as a practical matter, impair an inmate's access to the courts or to his attorney. See *Wilkinson* v. *Skinner*, 462 F. 2d 670, 672 (C.A. 2); *Smith* v. *Robbins*, 454 F. 2d 696 (C.A. 1); *Holt* v. *Hutto*, 363 F. Supp. 194, 210 (E.D. Ark.); *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F. Supp. 676, 689 (D. Mass.) (right to read incoming mail limited only as to attorneys in same state as jail); *Brenneman* v. *Madigan*, 343 F. Supp. 128, 141-142 (N.D. Cal.). See also Comment, *Judicial Recognition of Prisoners' Constitutional Right to Send and Receive Mail*, 76 Dick. L. Rev. 775, 788 (1972).

The more stringent standard endorsed by the court below ignores the realities of the institutional setting. As a recent report indicates:

> Contraband must be excluded from correctional institutions to preserve their security and good order by limiting the development of inmate power groups often resulting from acquisition of contraband. The standard authorizes the correctional administrator to inspect incoming and outgoing mail for contraband but not to read or censor the contents. [National Advisory Commission on Criminal Justice Standards and Goals, *Report on Corrections* 67-68 (1973).]

Similar problems have been recognized by the courts. One particular example was discussed by the court in *Holt* v. *Hutto*, *supra*, 363 F. Supp. at 210:

> [T]he Court can easily see how a lawyer might mail his client a check, money order, or currency. It has long been prison policy to prohibit inmates from having in their possession what is called "free world" or "green" money. The reasons for the prohibition are obvious. An inmate with currency in his possession may be the subject of attack by other inmates; an inmate with funds is in a better position after escape than an inmate who has no money; the money in the possession of an inmate may be used to bribe guards or other prison employees.

The court of appeals dismissed these arguments with the observation that "the danger that a letter from an attorney, an officer of the court, will contain contraband is ordinarily too remote and too speculative to justify the defendants' regulation * * *"

(Pet. App. 12; 483 F. 2d at 1067).[29] If prison officials have doubts about the authenticity of the letter, the court suggests that "a simple phone call" should prove sufficient to settle the matter.

Such a requirement, however, would prove excessively burdensome in light of the vast amount of correspondence addressed to inmates from persons identifying themselves as attorneys.[30] Indeed, a sizeable portion of such correspondence may not in fact be sent by the attorney but rather by a staff assistant or para-professional, under no legal or ethical compulsion to behave as an "officer of the court." Compare Brief for Appellants at 24-30, *Procunier* v. *Martinez*, No. 72-1465. Moreover, the effect of the holding below would vest in the inmate's attorney, rather than prison administrators, the ultimate determination of what articles constitute contraband—a result that is patently erroneous. Compare *Goodwin* v. *Oswald*, 462 F. 2d 1237, 1248-1252 (C.A. 2) (Friendly, J., dissenting).

While the prohibition adopted by the court of appeals may permit the discovery of clearly discernible

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[29] *A propos* the suggestion that introduction of contraband by attorneys is a remote possibility, we note that the weapon used during the escape attempt by convict George Jackson, which led to the slaying of three California prison guards, may have been brought into the prison by his attorney. See *New York Times*, August 23, 1971, p. 1. We understand that the attorney has since been indicted for this action, although he has not yet been apprehended.

[30] It would be particularly burdensome and costly in the federal prison system, because any given institution contains inmates from all parts of the country, who are represented by attorneys throughout the country. Apart from expense,

contraband, it makes no provision for items not capable of detection by physical manipulation of an envelope or by scientific means. These articles include narcotics, chemicals and money. The Bureau of Prisons has conducted extensive research with devices such as metal detectors, fluoroscopes and x-ray type devices, with a view towards facilitating inspection of inmate correspondence. To date, however, none of these devices has proven sufficiently reliable to replace physical inspection of mail.[21]

We submit that the extent of the inspection provided for by federal prison rules strikes a permissible balance between an inmate's right to correspond with counsel and the practical needs of prison officials to maintain some control and surveillance over materials entering the prison. Accordingly, to the extent that the court of appeals' decision would bar even the limited inspection practices of the Bureau of Prisons, it is unsound and warrants reversal by this Court.

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the difficulties in reaching busy criminal lawyers, so often in court, would be exacerbated by cross-country time changes.

[21] We are informed by the Bureau of Prisons that metal detectors are not yet sufficiently sophisticated to detect various type of weapons with complete assurance and that x-ray machines, though capable of detecting items having a solid mass, are not reliable for detection of items such as narcotics or currency.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed or modified in the respects discussed above.

Respectfully submitted.

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APPENDIX

A. The Early American Prison System and Disciplinary Procedures

The contemporary prison system is of relatively recent origin, and its underlying theories and practices are in, and are the result of, constant evolution. The role of institutional discipline is integrally involved in this evolutionary process, as the mechanisms and ends of discipline do not stand separate and apart from the day-to-day operational or treatment programs of the correctional institution but are an essential part of them.

Although jails and prisons had existed in the Colonies for paupers and for the detention of those convicted of minor crimes, punishment—in the form of hard labor and corporal punishment—was viewed as the principal means (along with execution) of deterring serious criminal behavior. Tappan, *Crime, Justice and Correction* 601-605 (1960). Discipline and order were generally lacking within the early colonial custodial facilities.

The requirement of discipline or good order in prisons has the same historic roots as the development of the prison as a tool in combatting crime. The first American penitentiary was established in Philadelphia, in 1790, in the Walnut Street Jail, where the use of imprisonment in solitary confinement was established as the prevailing method of punishing and deferring crime. Erected within the yard of the old jail, the penitentiary contained 24 in-

dividual cells for the confinement of the more hardened offenders. *Id.* at 605-606. These cells served as isolated, segregated, places where penitence might be extracted from those confined.

Prior to 1829, under what came to be known as the "Pennsylvania System," the prisoner was continuously confined to a solitary cell without permission to labor. For several years thereafter, inmates were permitted to work alone in complete solitude; all communication, with the exception of religious advisors and official visitors, was forbidden. This regime denied the prisoner all knowledge of anything that took place beyond the walls of the prison. See Wilson, *The Crime of Punishment* 219-220 (1931). Thus, in these early times the essence of imprisonment for crime was total segregation.

While the Pennsylvania system was developing, the State of New York experimented with a similar system of solitary confinement. The effect on the prisoners, however, proved too severe. As a result of this experience, New York developed a compromise solution known as the "Auburn" or "silent" system, in which the inmates were employed in congregate shops during the day under a strict rule of silence and placed in solitary confinement during the night. Tappan, *supra*, at 609-610. Prisoners were marched to work in a military lock-step, with their eyes cast on the guard during the march and on their work while in the shop. Violations of any of these rules resulted in immediate infliction of corporal punishment by the guards.

While the lack of disruption commended the Auburn system to officials in other states, the severe methods of control also resulted in substantial criticism. As one observer noted in commenting on the New York approach:

> Yet with all these advantages I cannot offer this system for adoption; and my chief objection arises from the means employed to procure them. It is by the lash, put into the hands of the keeper, to be used at discretion, and by a power strangely I think declared to be legally vested in the turnkey. The objections to this system are obvious. And first, the anomaly presents itself, not to call it by a harsher name, of permitting a punishment to be inflicted at the discretion not only of a man at the head of the institution, but by his under officers, at their discretion, and that too for disrespect, or the vague charge of disobedience, which punishment the law has abolished as too ignominious, unequal, and cruel, to be inflicted by the court for dangerous crimes. [Livingston, *System of Penal Law, Introductory Report to the Code of Reform and Prison Discipline*, p. 8 (1828).]

The abuses of the Auburn system prompted some states adopting its general approach to place limitations on the application of physical punishment. In Massachusetts, no punishment could be inflicted for any offense by an inferior officer or by any other authority than the administrator of the prison, "who after deliberate hearing and consideration of the complaint and the defense, at the end of the day's work may cause stripes to be inflicted in his own

presence * * *." Gray, *Prison Discipline in America* (1848), reprinted in *Reports of the Prison Discipline Society, 1846-1854*, vol. III, at 6-9 (1855). Punishment in the Massachusetts institution was limited to those "absolutely requisite * * * for the preservation of good order." *Id.* at 13. Massachusetts was also instrumental in developing programs of secular and religious education and recreation, and counseling services for discharged prisoners. Tappan, *supra*, at 610.

In the years following the Civil War, the controversy regarding the Auburn and Pennsylvania systems for maintenance of order and discipline dissipated. The rigid rules of silence and solitary confinement were replaced by relative freedom of association and communication. The small solitary cells were replaced with larger, more well-lit units. The innovations commenced in the Massachusetts system led to the development of treatment and guidance programs. *Id.* at 611.

Disciplinary practices, however, did not evolve quite so rapidly. Until well into this century corporal punishment, through the use of the lash, shackling or cuffing to the bars, cold baths, and gagging, continued to be used in state institutions as a means to enforce discipline. See Attorney General's Survey of Release Procedures, Vol. 5, p. 122 (1940). See also *Jackson* v. *Bishop*, 268 F. Supp. 804 (E.D. Ark.), reversed in part, 404 F. 2d 571 (C.A. 8) (holding corporal punishment to be cruel and unusual punishment in violation of the Eighth Amendment).

Until recently, discipline was frequently meted out in a prompt and arbitrary fashion, at the location of the infraction or after the offender received a *pro forma* "write-up." However, increased awareness on the part of correctional officials of the effects of unsupervised, unregulated and erratic disciplinary practices, coupled with increased judicial concern for the rights of the confined, has resulted in a redefinition of institutional disciplinary procedures. See South Carolina Department of Corrections Collective Violence Research Project, *Inmate Grievance Procedures* 24 (1973). The federal prison system has been a leader in this change.

B. The Origin and Development of the Federal Bureau of Prisons and of its Rules for Disciplinary Proceedings

1. *Historical development.* Prior to the turn of the century, federal prisoners were generally incarcerated in state and local facilities. In the 1890's, the growing number of federal inmates, coupled with demands from reform groups that the federal government assume more responsibility in this area, led to the creation of separate federal facilities. Tappan, *supra*, at 619.[1] Between 1905 and 1930, the federal government established five correctional institutions.[2]

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[1] Tappan states that in 1885 there were over 1,000 federal prisoners in state prisons and approximately 10,000 in county jails. *Ibid.*

[2] The first federal prison was built at Leavenworth, Kansas, and was opened in 1905. Atlanta Penitentiary was opened later that year, followed by McNeil Island Penitentiary (pre-

The Superintendent of Prisons in the Department of Justice had only nominal control over these institutions. The Superintendent's staff was small and their resources limited; as a result they could neither inspect nor supervise the prisons adequately. Bureau of Prisons, *Thirty Years of Prison Progress* 4-5 (1961). For all practical purposes the federal institutions were under the control of their respective wardens. Responsibility for inmate assignments and discipline was delegated to the deputy wardens. Discipline in the early years of the federal prison system was administered in an authoritarian fashion, with penalties varying in harshness from several days in isolation on bread and water to forfeiture of all good time credit. An inmate who protested such penalties risked being shackled to his cell bars. *Ibid.*

Congressional concern for the lack of unified authority in the management of federal institutions led to the creation of the Federal Bureau of Prisons in 1930.[8] The enabling legislation (46 Stat. 325; see

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viously a territorial jail) in 1909. In 1926, the first federal reformatory was opened in Chillicothe, Ohio, and the following year the first prison for women was completed at Alderson, West Virginia. Huston, *The Department of Justice* 204-206 (1967).

[8] As noted by the report of the House Judiciary Committee:

"Heretofore, there has not been a sufficient coordinating force at the seat of government to direct the many problems connected with the administration of our prisons, the education and welfare of the inmates, the industrial activities in our prisons and the care and treatment of Federal prisoners in the 900 local jails distributed

18 U.S.C. 4042) set forth the duties of the Bureau, which included:

> the management and regulation of all Federal penal and correctional institutions and * * * [responsibility] for the safe-keeping, care, protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States * * *.

During its initial two decades, the Bureau of Prisons issued no formal guidelines regarding the discipline of inmates. However, there developed, under the supervision of the Director's office, a procedure whereby reports of inmate misconduct were presented to a committee at each institution (frequently called the Adjustment Committee) for disposition. The committee, which was generally composed of high-level staff members, had a broad range of dispositional alternatives, including placement in segregation or forfeiture of accrued good time.[4] Corporal punishment was forbidden. See *Jackson* v. *Bishop*, *supra*, 268 F. Supp. at 813-814.

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throughout the country." (H. Rep. No. 106, 71st Cong., 2d Sess., p. 2 (quoting statement of Attorney General)).

Companion legislation provided for the establishment of federal prison industries (46 Stat. 391) and the construction of two additional correctional facilities (46 Stat. 1574).

[4] We are informed by James V. Bennett, Director of the Bureau of Prisons from 1937 to 1964, that the Bureau's policy in this regard was imparted to field administrators by the following means:

In 1954, the Bureau issued its first formal statement regarding discipline of federal prisoners. In a memorandum directed to all wardens and superintendents, Director Bennett stated that, following a report of misconduct, an inmate could be placed in segregated status awaiting action by the disciplinary committee for no longer than two days. The prisoner could be placed in isolation for punishment only after a finding by the disciplinary committee (composed of at least three staff members) that there had been a violation of institutional rules. The committee could commit the inmate to isolation for an indeterminate period, but he could not be held beyond ten days without specific written approval of the warden. All prisoners placed in isolation were to be visited at least once each day by the institution physician and an associate warden, and at least hourly by a custodial officer. Bureau of Prisons, *Policies Regarding Punishment of Prisoners*, issued November 4, 1954.

The current philosophy and practice of the Bureau—which include significantly greater procedural

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(1) In the course of periodic inspections of institutions, the Director would review the proper disciplinary procedure to be employed.

(2) Discussion of appropriate disciplinary practices was a part of the agenda of the yearly wardens' conference.

(3) In reviewing misconduct reports where a loss of accrued good-time occurred or the disciplinary action taken was substantial, the Director would indicate the Bureau's policy if the procedures employed deviated from required norms.

protection for the prisoner than in 1954—derive largely from a study of its institutional policies and practices relating to discipline undertaken by the Bureau in 1965 "in recognition of the fact that this has been a relatively neglected area of Prison Service administration." Bureau of Prisons, *Report of Findings Relating to Disciplinary Policies and Practices* (1966). The report found discipline to be essential to the objectives of the institution generally, *i.e.*, security and control, efficient and economical management, and a purposeful program of coordinated rehabilitative activities.[5] Specifically, the report reviewed the basic objective of any disciplinary measure as being an attempt to achieve future voluntary acceptance by the inmate of the institutional limitations imposed upon him, with the ultimate goals being self-discipline and freedom from incarceration.

The report (1) delineated a framework within which to achieve the objectives of effective discipline;[6]

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[5] Reflecting these objectives, the report adopted the following guidelines (*id.* at 2):

> We accept as our responsibility that a prisoner shall not be damaged physically, mentally or morally by the experience of confinement. We also believe in making practical use of every available resource in trying to understand the inmate as a problem human being and in helping him find, while in our institutions, the means of successful community life following release. Discipline has to do with but one aspect of his adaptation to the institution and its programs.

[6] The principles outlined were (*id.* at 3):

> 1. Disciplinary action shall be taken only at such times

(2) reaffirmed, as the basic authority for the administration of inmate discipline, the use of the Adjustment Committee consisting of at least three members (frequently an Assistant Warden, Chief of Classification, and a third member from the medi-

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and in such manner and degree as is necessary to regulate an inmate's behavior within acceptable limits.

2. Inmate behavior must be controlled in a completely impersonal, impartial and consistent manner, with due regard for the objectives of effective discipline and the inmate's capability and willingness to conform to expectations.

3. Disciplinary measures shall never be capricious, in the nature of retaliation or revenge, nor applied for any purpose other than the control and correction of the inmate involved.

4. Group restrictions of penalties shall not be imposed as a means of discipline for the misconduct of an individual.

5. Corporal punishment of any kind is strictly prohibited.

6. Appropriate disciplinary action should be taken as soon after the commission of an offense as circumstances permit.

7. All inmate misconduct shall be reported, thoroughly investigated and complete record maintained of disciplinary action taken.

8. Both punishment and incentives are essential elements of effective control. Both shall exist simultaneously and should be proportionate.

9. However important an act of misconduct, the administration of discipline is concerned with the inmate's total adaptation to the institutional community. Disciplinary action should be visible to other inmates and staff.

10. It is the responsibility of management to evaluate the circumstances of inmate misconduct to the end that constructive and preventive measures will be taken, where possible, before misconduct occurs.

cal or educational staff);[7] and (3) indicated that different procedures should be employed with respect to the more severe punishments, such as forfeiture of accrued good-time. *Id.* at 10. See generally Richmond, *Prisoner Management And Control* (1969).

Based upon this review of institutional discipline, the Bureau of Prisons issued two policy statements in 1966 adopting the proposed objectives and procedures. One statement concerned "Inmate Discipline" in general (Bureau of Prisons, Policy Statement 7400.5, issued November 28, 1966), and the other was specifically directed at "Withholding, Forfeiture, and Restoration of Good Time" (Bureau of Prisons, Policy Statement 7400.6, issued December 1, 1966). As a result of a continuing process of internal review and assessment of operations thereunder, these policy statements have each since been revised at least once, the current versions of the "Good Time" and "Inmate Discipline" statements having been issued in 1971 and 1972, respectively.

2. *Current procedures for inmate discipline other than loss of good time.* Under the most recent "Inmate Discipline" policy statement (7400.5B issued June 6, 1972), administration of discipline is vested in the Adjustment Committee, or Treatment Team,[8]

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[7] It was felt that with this composition, the Adjustment Committee reflected a "conscious effort on the part of institutional administrators to place this important responsibility in the hands of personnel who are most competent, who broadly represent all areas of institutional operations * * *." *Id.* at 4.

[8] The Treatment Team is the counterpart of the Adjustment Committee in some institutions.

as a sub-committee of the Classification Committee at each institution. The ultimate purpose which the Adjustment Committee's actions are to serve "is to assure that inmate discipline and control are fully consonant with the correctional objectives of the institution, the focus being on (a) individual inmate adjustment to the programs, behavior standards, and limitations imposed by the administration; and, (b) the general welfare and safety of the institutional community." *Id.* at 1.

These overriding purposes are further delineated in a number of "essential principles" by which disciplinary action is to be governed,* in recognition of the fact "that disciplinary sanction is but one factor

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* The principles are as follows (*id.* at 1-2):

(1) Disciplinary action shall be taken at such times and in such measures and degree as is necessary to regulate an inmate's behavior within acceptable limits.

(2) Inmate behavior must be controlled in a completely impersonal, impartial and consistent manner.

(3) Disciplinary action shall not be capricious nor in the nature of retaliation or revenge.

(4) Corporal punishment of any kind is strictly prohibited.

(5) The determination of disciplinary measures against any inmate is the responsibility of the Adjustment Committee and/or Treatment Team. Limited action in minor infractions, as defined by the head of the institution, may be delegated when supervised and controlled by the Adjustment Committee.

(6) Disciplinary action shall be taken as soon after the occurrence of misconduct as circumstances permit.

(7) It is essential that inmate case records reflect misconducts, dispositions and include interpretive and evaluative statements regarding them.

in correctional treatment and control and that, as applied to an inmate who has misbehaved, the objective is his future voluntary acceptance of certain behavior limitations which are being imposed upon him." *Ibid.*

The principal disciplinary functions of the Adjustment Committee are to receive reports of misconduct, hold hearings, make findings, impose disciplinary actions, and, where indicated, to refer violators for diagnosis or special handling. *Id.* at 7. Disciplinary action is to be "individualized in keeping with such factors as the offender's past history, institutional adjustment, motivation, and attitude." *Id.* at 6.

The Committee has access to a broad range of dispositional actions. It may exonerate the inmate; refer him to various institutional program and service resources; reprimand him; subject him to certain restrictions; withdraw certain privileges; remove him from certain programs, job assignments, or quarters; order him to be segregated; [10] release him from segregation with time served; continue him in segregation with further review at a later date; order him re-

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[10] Inmates may also be segregated "for the purpose of insuring immediate control and supervision when it is determined that they constitute a threat to themselves, to others, or the safety and security of the institution * * *." *Id.* at 2. Additional purposes served by segregation are to protect potential victims, to insure witnesses against intimidation, and to support those who lack sufficient strength to live in the prison community. *Id.* at 9. Regardless of the purposes of the segregation, detailed rules have been adopted to implement the policy that "[b]asic living levels of decency and humane treatment must be maintained * * *." *Id.* at 9-11.

turned to the general population; recommend transfer to another institution; recommend (but not impose) the withholding or forfeiture of good time.

The choice of the appropriate disposition should be "a composite group judgment which takes cognizance of the reasons for the adverse behavior, the setting and circumstances in which it occurred, the involved inmate's accountability, and the correctional program goals set for him. The choice of disposition goes far beyond mere compliance with regulations. To be fully effective, the inmate must understand and accept the reasonableness of the limitations being imposed upon him." *Id.* at 7.

With respect to serious disciplinary measures other than an actual forfeiture of good time (which we discuss below, pp. 16a-21a, *infra*), the policy statement (as revised in 1972) establishes detailed procedural requirements governing the actions of the Adjustment Committee.[11]

An inmate charged with misconduct is advised of the specific charges [12] by a staff member (other than

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[11] For minor violations of the rules, limited disciplinary action may be taken by a screening officer. Records of such violations must be maintained and such disciplinary actions are reviewed by the Chairman of the Adjustment Committee. *Id.* at 9.

[12] This policy statement includes sections which set forth the rights and responsibilities of federal inmates and a list of prohibited acts. *Id.* at 3-6. At the time of his arrival at the institution, the prisoner is advised in writing of acts prohibited in the institution and of the types of disciplinary action that may be taken.

the reporting officer) and is given an opportunity to state his version of the incident. If the inmate has been placed in segregation, investigation of the report of misconduct must be completed by the staff member, and the inmate given written notification of charges, within 24 hours thereafter. The matter is then referred to the Adjustment Committee, which meets at least three times a week.

When the inmate is called before the Committee (of which neither the reporting nor the investigating officer shall be a member), he is again advised of the charges and asked for a statement with reference thereto. If the inmate denies the charges or the Committee has some doubt about them, the matter may be referred back for further investigation. Witnesses may be called by the Committee, but they are not available for cross-examination. The Committee's determination is based on a review of the misconduct report, the results of the investigation, and any pertinent information or statement presented at the hearing. The Adjustment Committee report, a copy of which is provided to the inmate, must clearly state the offense, place and time of occurrence, and witnesses; it must also include a clear statement of the conclusions of the Committee as to the inmate's involvement in the prohibited act, the information upon which the conclusion is based, and the Committee's disposition. Finally, the inmate must be advised in writing of the Committee's decision. *Id.* at 7-8.[13]

[13] We are advised by the Bureau of Prisons that, while the Committee exercises its discretion as to whether all evidence

3. *Current procedures for withholding and forfeiture of good time.*[14] In recognition of the potentially more substantial impact on individual interests of a forfeiture of good time, the original 1966 policy statemen provided that the Adjustment Committee could recommend forfeiture or withholding of good time (subject to the approval of the Chief Executive Officer of the institution) only after satisfying specified procedural requirements which were not then required as to other modes of discipline.

Under the current procedures, in cases where a forfeiture of good time (or the withholding of good time credits for more than one month[15]) may be appropriate, the matter is referred to a special com-

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is disclosed to the inmate, its report will indicate the fact that the Committee has relied on undisclosed evidence where that is the case.

[14] Although the issue of due process protections in this context is not directly before the Court (see p. 18, *supra*) we refer to the matter to provide more complete background about the Bureau of Prisons' rules and to illustrate how, for the more serious and less frequent hearings concerning loss of good time, more elaborate procedures have been adopted than for other disciplinary measures.

[15] A recommendation by the Adjustment Committee that good time be withheld, as opposed to forfeited, may be acted on by the Chief Executive Officer without the further action of the Board. The policy statement provides that withholding should not necessarily apply automatically to inmates in segregation status and, in any event, is limited to the time creditable for the month in which the violation occurred. Withholding of a greater amount of good time is to be handled by forfeiture proceedings. Bureau of Prisons, Policy Statement 7400.6A, issued August 13, 1971, p. 1.

mittee established for this purpose, called the Good Time Forfeiture Board.[16]

The procedures now required (Bureau of Prisons, Policy Statement, 7400.6A, "Withholding, Forfeiture, and Restoration of Good Time," issued August 13, 1971, pp. 1-2) may be summarized as follows:

1. The inmate is called before the committee and advised of the details of the report of misconduct and of the rules of procedure to be followed by the committee.[17]
2. If the inmate admits that the allegations of misconduct are true, no further evidence need be heard, but the inmate is permitted to offer a statement in mitigation to be considered by the Board in making its recommendations.
3. If the inmate does not admit the misconduct, he is advised that he can have a member of the staff assist him at the hearing. If he so wishes, the inmate may submit the name of a full-time staff member. The Chairman, with the consent of the designated staff member, arranges for this person to represent the inmate. If the staff member chosen declines or is not available because of absence from the institution, the inmate is given the option of

[16] We are informed by the Bureau of Prisons that the Board, like the Adjustment Committee, does not include the reporting or investigating officer.

[17] If it appears at any time to any member of the Board that the inmate may be mentally ill, the Chairman should refer the inmate to the medical staff for a determination of whether the inmate is incompetent, within the meaning of 18 U.S.C. 4244. Good time shall not be forfeited in the case of an inmate who is determined to be incompetent. *Id.* at 1-2.

choosing another representative or, in the case of an absent designee, of waiting for a reasonable period until his return. The Chairman recesses the hearing to permit the representative to interview the inmate and to prepare the inmate's presentation.

4. Formal rules of evidence and of trial procedure do not apply to the hearing. The Chairman arranges for the presentation of the evidence supporting the misconduct report. Any member of the Board can request that the Chairman arrange for additional investigation or evidence, or for the appearance of additional witnesses, or for the statements of unavailable witnesses. The Chairman may determine that the source of certain information should not be revealed to the inmate, *e.g.*, when disclosure may endanger the safety or well-being of another person. In such a case, the report of the Board should summarize the circumstances and the reasons for this determination. Otherwise, all evidence heard or seen by the Board is made known to the inmate (and his representative).
5. After the evidence supporting the misconduct report is heard, the inmate or his representative is permitted to make a statement. The inmate can request witnesses on his behalf. The Chairman will call those witnesses (staff or inmates) who are available, and who are determined by him to be necessary for an appreciation of the circumstances. Repetitive witnesses need not be called. Unavailable witnesses may be asked to submit written statements. The Chairman must note in the Board's report the reasons for declining to call requested witnesses.

6. The inmate and his representative are permitted to make a final statement on his behalf.
7. The Board members discuss the case, deciding upon the findings of fact that are supported by the evidence, and upon the recommendations to be made to the Chief Executive Officer.
8. A written report is submitted to the Chief Executive Officer, containing a record of the proceedings and evidence (a verbatim transcript need not be made, but the record of the hearing should summarize all aspects of the proceedings and the facts presented before it), and the recommendations of the committee, including reasons stated as specifically as possible. Any member of the Board can submit a minority report.[18]
9. The Chief Executive Officer reviews the report of the Board and makes an endorsement on the report, accepting or rejecting the Board's findings, and ordering a forfeiture if warranted by the evidence and if appropriate under all the circumstances.[19]

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[18] We are advised by the Bureau of Prisons that the report indicates whether information not disclosed to the inmate has been relied upon.

[19] The good time available for forfeiture consists of an amount computed by multiplying the number of months served at the time of the offense for which forfeiture action is taken times the applicable monthly rate specified in 18 U.S.C. 4161 (less any previous forfeiture and withholding outstanding), plus any extra good time which may have been earned to the date of the offense. As to extra good time, see Bureau of Prisons, Policy Statement 7600.15, "Industrial and Camp

10. A copy of the report of each forfeiture proceeding and of the Chief Executive Officer's decision is forwarded to the Office of General Counsel and Review of the Bureau of Prisons. The Chairman of the Classification Committee, or his designated representative on that Committee, informs the inmate of the decision of the Chief Executive Officer, and provides him with a copy of the written report and the decision of the Chief Executive Officer. The inmate is advised that this decision can be appealed to the Office of General Counsel and Review through the Prisoners' Mail Box. The inmate is permitted to confer in this regard with the staff member who represented him at the hearing.

Upon administrative review of a forfeiture of good time, consideration is given to whether (1) there has been compliance with the procedural requirements; (2) the decision has a substantial factual basis; and (3) the amount of time forfeited is proportionate to the violation and other circumstances. *Id.* at 3-4.

The restoration of good time is regarded as a valuable instrument of case management, and authority to restore both withheld and forfeited good time, in whole or in part, is delegated to the Chief Execu-

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Good Time" (issued August 1, 1955); Bureau of Prisons, Policy Statement 7600.50A, "Meritorious Good Time and Meritorious Service Awards," issued February 23, 1971; Bureau of Prisons, Policy Statement 7600.50B, "Extra Good Time," issued February 16, 1972. See also 18 U.S.C. 4126, 4162.

tive Officer of each institution. *Ibid.* The rules governing restoration vary depending upon the nature of the institution (*e.g.*, those for long-term adult offenders, youth corrections, etc.).

4. *Development of a prisoner grievance procedure.* The carefully considered, gradual development of more elaborate procedures concerning prison discipline is being paralleled by the recent institution of an administrative remedy procedure in federal prisons by which inmates may be assured of prompt action on their grievances.[20] See generally Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125, 1128 (1973). Based on the successful operation of a program instituted in 1973 on a pilot basis in three institutions,[21] this program became effective in all fed-

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[20] Under the new procedure, an inmate who cannot resolve his complaint through informal contact with the staff may file a formal complaint for administrative remedy. He may obtain assistance from other inmates or from institution employees in completing the form. The complaint is then given to a designated staff member, who provides the inmate with a signed receipt. The institution staff has fifteen working days to act upon the matter and provide a written response to the inmate. When the complaint is of an emergency nature and involves an alleged threat to the inmate's health or welfare, reply must be made within 48 hours from the receipt of the complaint. If the inmate is not satisfied with the institution's response, he may file an appeal to the Director of the Bureau of Prisons through the Prisoners' Mail Box. A receipt for his appeal will be sent to the inmate, and the Director has 30 days to reply. Bureau of Prisons, Policy Statement 2001.6, "Administrative Remedy of Complaints Initiated by Offenders in Bureau of Prisons Facilities," issued February 14, 1974.

[21] The pilot project has demonstrated that such a procedure can be responsive to inmate complaints. During the first four

eral institutions on April 1, 1974. Such a procedure may well not only reduce the burden imposed on federal courts by suits reflecting prisoners' grievances,[22] but also may reduce the frequency and intensity of inmate-staff confrontations and attendant inmate mis-

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months of the pilot program (September 1 to December 31, 1973), inmates at the three institutions filed 164 complaints, of which 35 percent were determined in the inmates' favor. Of the total number of complaints, at least 26 related to disciplinary matters. A total of 27 appeals were filed with the Director, 23 percent of which were successful.

[22] Federal and state prisoners have turned increasingly to federal courts to complain about sentences, conditions of confinement, and personal inconveniences incidental to incarceration. As Chief Justice Burger recently observed:

> Twenty years ago complaints filed in federal courts by prisoners in state prisons were hardly enough to give any concern. In fiscal 1972, there were more than sixteen thousand petitions of various kinds filed challenging the validity of the conviction even after full review by other courts. In addition, prisoners have filed more than four thousand cases under the Civil Rights Act claiming mistreatment or denial of rights. [Burger, *supra*, 59 A.B.A.J. at 1128.]

A similar increase in litigation has been noted with respect to actions filed by or on behalf of federal prisoners. See Annual Report, Administrative Office of United States Courts, Part II (1973), 27-29. A number of these state and federal prisoner cases have challenged, as respondents have below, procedures employed in prison disciplinary actions.

conduct, thereby reducing the number of occasions requiring disciplinary action.[23]

[23] According to a recent study (South Carolina Department of Corrections Collective Violence Research Project, *Inmate Grievance Procedures, supra*, p. 8):

> Those state prisoners randomly sampled in preparation of this monograph, uniformly placed the lack of adequate means of communication with decision-making correctional staff and the absence of established procedures for venting grievances, as the primary causes of prison unrest. Perhaps the ever-increasing spate of institutional disturbances that highlight specific lists of inmate grievances gives some support to this generally held belief.

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